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STATE AND FEDERAL CONTROL OF CORPORATIONS.

IT would seem that the precise line of demarcation between the power of Congress and that of the states to control corporations engaged in commerce or transportation, remains to be clearly defined by the courts. The power of Congress in this respect, even if not exclusively derived from the commerce clause,¹ may, for present purposes, be conveniently so regarded.

I. POWER OF CONGRESS OVER FEDERAL CORPORATIONS.

On principle, it may not be easy to accept the view that the mere power to regulate commerce or transportation includes the power to create a corporation for the purpose of engaging therein. Nevertheless, as a matter of authority, it must be regarded as established that Congress has such power. A notable instance of its exercise was the authorization of the construction and maintenance of the Pacific railroads.² By the same rule Congress may, instead of itself creating a corporation, confer powers upon a corporation created by a state.³

Generally speaking, Congress doubtless has complete power of control over a corporation of its own creation, so far as concerns what is strictly commerce or transportation within the scope of the commerce clause, that is, interstate and foreign commerce generally.⁴ It is equally true, however, that this power of Congress is subject to limitations imposed by other provisions of the Constitution, notably by the Fifth Amendment.

It may not be clear that a corporation created by the federal government has power to engage at all in commerce or transportation

¹ Compare, as to effect of power "to establish post-offices and post-roads," *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1 (1877).

² *California v. Central Pacific R. R. Co.*, 127 U. S. 1 (1888); *Roberts v. Northern Pacific R. R. Co.*, 158 U. S. 1, 21 (1895).

³ *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641, 657 (1890).

⁴ As to regulation of rates for transportation, see *Atlantic & P. R. Co. v. U. S.*, 76 Fed. 186, 192 (D. C. Cal., 1896).

purely intrastate, save as a matter of comity. But, however that may be, has Congress power of control over such corporations, so far as concerns such intrastate commerce or transportation? It has indeed recently been contended with some plausibility that "Congress has the constitutional power to regulate interstate railroads, not only with respect to their interstate business, but with respect to their intrastate business as well, and thus to bring such railroads wholly and exclusively under the regulation of the national government."¹ But this view seems hardly in accord with the doctrine stated in *Gibbons v. Ogden*² and applied in the *Employers' Liability Cases*,³ that the power of Congress does not extend to "that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states." The conclusion that such power is not in Congress involves the further conclusion that it is in the states. If, however, Congress has such power, it is submitted that the power exists merely by way of incident to the power to regulate what is strictly commerce or transportation within the scope of the commerce clause.

For the reasons just stated, it likewise seems beyond the power of Congress to exercise as to a corporation of its own creation, what are sometimes referred to as the "police powers," reserved to the states, and exercised generally, not for the benefit of travelers or shippers, but for the benefit of "the public." Thus, for example, it is doubted that Congress has the power to regulate the speed of interstate trains while within a state. Here again the conclusion that such power is not in Congress involves the further conclusion that it is in the states.⁴

There seems no reason to doubt that it is within the power of Congress to create a corporation for the purpose, not, indeed, of engaging in commerce or transportation as a carrier, but of trans-

¹ D. W. Fairleigh in 9 *Columbia Law Rev.* 38. The reasoning herein seems largely available in support of the proposition that the states have power to regulate interstate railroads (at any rate, those of their own creation) with respect not only to their intrastate business, but to their interstate business as well. This latter proposition may be acceptable on principle, but, as we shall presently see, the contrary view is established.

² 9 *Wheat.* 1, 194 (1824).

³ 207 U. S. 463, 493 (1908).

⁴ This point is involved in the question of the validity of the *Federal Employers' Liability Act*.

porting as a shipper through the agency of carriers. This would probably include the power to sell merely by way of incident to such commerce or transportation, but it seems clear that such corporation would derive from Congress no power to engage in manufacturing or selling wholly within a state. It might, however, possess such power as a matter of comity. As to such internal transactions, though created by Congress, it would not be subject to regulation by Congress, unless by way of incident to commerce or transportation within the scope of the commerce clause. Indeed, it is hard to see how even such power of regulation would exist.

II. POWER OF THE STATES OVER FEDERAL CORPORATIONS.

Turning now to a consideration of the power of the states to control a corporation created by Congress for the purpose of engaging in commerce or transportation within the scope of the commerce clause, it seems evident that a state can assert no power of control in regard to commerce or transportation strictly within the commerce clause. Thus a state has no power to regulate rates to be charged on interstate or foreign commerce or transportation.¹

Whether the power of a federal corporation to engage in purely intrastate commerce or transportation be derived from Congress, or from the states, as a matter of comity, it is submitted that as to such commerce or transportation the power of control is in the states and not in Congress.² Thus the power to regulate rates on intrastate traffic rests entirely with the states. In *Reagan v. Mercantile Trust Co.*³ such power of a state was sustained, the corporation being said

¹ Being without such power even as to a corporation of its own creation, *a fortiori* it is without it as to a corporation created by Congress.

² Just as it is beyond the power of a state to control even a corporation of its own creation, as to commerce or transportation within the scope of the commerce clause.

³ 154 U. S. 413 (1894). But whether it is within the power of Congress to remove a federal corporation from state control, seems to have been here left open, for it was said: "Conceding to Congress the power to remove the corporation in all its operations from the control of the state, there is in the act creating this company nothing which indicates an intent on the part of Congress so to remove it." See also *Smyth v. Ames*, 169 U. S. 466, 522 (1898), which also seems indecisive of the point. In *State v. Texas & Pac. Ry. Co.*, 100 Tex. 279 (1907), however, the court denied, as to such a corporation, the power of the state "to tax the occupation of doing a railroad business wholly within the state." The statement in *Reagan v. Mercantile Trust Co.* quoted in the text was said "to have reference, in the matter of taxation, to the rulings already made by that court, distinguishing between taxation of the property of such

to be "as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates, and other police regulations."

So too, for the reasons already stated, it seems within the power of the states to exercise, over a corporation created by Congress, those "police powers" that are for the benefit of "the public," as distinguished from travelers or shippers.

A corporation created by Congress for the purpose of transportation within the scope of the commerce clause, as a shipper, through the agency of carriers, clearly seems beyond the power of direct regulation by the states, so far as concerns such commerce. Thus a state could not exact a license fee as a condition of engaging therein. On the other hand a federal corporation does seem subject to such regulation as to commerce that is strictly internal.

III. POWER OF CONGRESS OVER STATE CORPORATIONS.

It has just been seen to be established that Congress has power to create a corporation for the purpose of engaging in commerce or transportation within the scope of the commerce clause. And nothing is better established than that the power of Congress under the commerce clause is exclusive of any exercise of such power under authority of a state, even in the absence of legislation by Congress. In *Asbell v. Kansas* ¹ it was said:

"The governmental power over the commerce which is interstate is vested exclusively in the Congress by the commerce clause of the Constitution, and therefore is withdrawn from the states."

The alleged distinction between matters "national" and matters "of local interest" ² has not been overlooked, though, for reasons which cannot here be elaborated, *Asbell v. Kansas* seems to the writer to go far toward justifying the conclusion that this alleged distinction has finally been repudiated by the Supreme Court. But, whatever

agencies and taxation of 'the right of the company to exist and perform the functions for which it was brought into being.' " In *Western Union Tel. Co. v. State*, 121 S. W. 194, 201 (Tex. Civ. App., 1909), *State v. Texas & Pac. Ry. Co.* was distinguished as a case of a statute "creating and conferring a corporate franchise to engage in local or domestic business," instead of merely conferring privileges upon a corporation created by a state.

¹ 209 U. S. 251 (1908).

² See *Brown v. Houston*, 114 U. S. 622, 630 (1885).

be the merits of such distinction, it is difficult to see how the creation of a corporation to conduct a transcontinental railroad is a matter merely "of local interest."

In this view it would seem to follow that it is beyond the power of the states to create a corporation for the purpose of engaging in commerce or transportation within the scope of the commerce clause. Yet, as a matter of authority, nothing is better established than that a state has such power. The extensive business of interstate transportation by railroad, as well as that of transmission of telegraphic messages, has been conducted rather by corporations created by the states than by those created by Congress. That such power lies in the states seems to have become established with little or no consideration of any objection furnished by the commerce clause. In *Railroad Co. v. Harris*,¹ for instance, this doctrine was applied to the Baltimore & Ohio Railroad Company, originally incorporated in Maryland, and operating extensively through several states. With reference to the power to operate in Virginia, the court said that in what the railway did in that state "the same principle is involved as in the transactions" under consideration in the well-known decision in *Bank of Augusta v. Earle*,² it seemingly never having occurred to any one concerned in the case that the effect of the commerce clause was involved.

As with a corporation created by itself, Congress unquestionably has complete control of a corporation created by a state, so far as concerns what is strictly commerce or transportation within the scope of the commerce clause.³ But, as has already been said, this power of Congress is subject to limitations imposed by other provisions of the Constitution, notably the Fifth Amendment, forbidding the federal government to deprive of "life, liberty, or property, without due process of law." In *Adair v. U. S.*⁴ it was said:

"The power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution."

Does, then, Congress have the power absolutely to prohibit transportation by a corporation created by a state? Although regulation,

¹ 12 Wall. 65, 81 (1870).

² 13 Peters 519 (1839).

³ *Northern Securities Co. v. U. S.*, 193 U. S. 197, 345 (1904).

⁴ 208 U. S. 161, 180 (1908).

in its ordinary sense, does not seem to include prohibition, it may be conceded that, as was said in *Northern Securities Co. v. U. S.*¹

"In some circumstances regulation may properly take the form and have the effect of prohibition."

Doubtless "liberty," within the meaning of the Fifth Amendment, does not include liberty to commit an act essentially criminal, such as theft or murder, or any other act contrary to public policy, as, for example, the maintenance of a lottery, or acts in contravention of the rule of free competition. Hence Congress has power to prohibit a corporation created by a state from engaging in commerce or transportation within the scope of the commerce clause, in so far as engaging therein involves the commission of such acts. Thus in *Champion v. Ames*² the court sustained, as applicable to an express company, an act of Congress prohibiting as a criminal offense the carriage of lottery tickets from state to state. So too, in *U. S. v. Trans-Missouri Freight Assoc.*,³ *U. S. v. Joint Traffic Assoc.*,⁴ *Northern Securities Co. v. U. S.*,⁵ the federal anti-trust act, enacted by way of giving effect to "the rule of free competition," was sustained as applicable to transportation by railroad corporations created by the states.

But all this is obviously very different from an absolute prohibition of transportation generally, which, in this view, is beyond the power of Congress, so far, at least, as the commerce clause is concerned.⁶ If such result be attainable at all, it must be by resort to some other provision of the Federal Constitution, as, for example, those sections conferring the power to tax.⁷ Yet even this seems doubtful.

The same line of reasoning is applicable to a corporation created by a state, and including among its powers that of engaging in transportation within the scope of the commerce clause as a shipper,

¹ 193 U. S. 197, 335 (1904).

² 188 U. S. 321, 356 (1903).

³ 166 U. S. 290 (1897).

⁴ 171 U. S. 505 (1898).

⁵ 193 U. S. 197, 335 (1904).

⁶ See *Champion v. Ames*, 188 U. S. 321, 362 (1903).

⁷ A suggestion of the existence of such power has sometimes been thought to be furnished by *Veazie Bank v. Fenno*, 8 Wall. 533 (1869), sustaining the imposition of a tax on the notes of state banks. See *Hendrick, The Power to Regulate Corporations and Commerce*, § 115. See also an article by H. L. Wilgus in 2 Mich. Law Rev. 358, 384 (1904).

through the agency of carriers. That is to say, subject to the limitations just considered, it is beyond the power of Congress absolutely to prohibit such transportation, or to require the performance of a condition, such as the payment of a license fee, before engaging therein.¹

So too, for the reasons already considered, neither of these classes of corporations seems subject to regulation by Congress as to purely internal commerce, or to the exercise by Congress of the "police powers" reserved to the states.

IV. POWER OF THE STATES OVER STATE CORPORATIONS, DOMESTIC AND FOREIGN.

It would seem that it might reasonably be contended that every corporation is subject to the control of the state which created it. In this view, the powers reserved to the states include such power of control, even as to what is strictly commerce or transportation within the scope of the commerce clause. It has pertinently been said:

"Certainly a state cannot be compelled to create corporations in aid of, or to facilitate commerce between the states; but if it does create one capable of engaging in such commerce, and the corporation in fact so engages, is that an emancipation of the corporation from the control of the state?"²

But the contrary view seems well established. Thus, in *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*,³ it was as to a domestic railroad corporation that there was held invalid the regulation of rates for transportation within the scope of the commerce clause. And in *Philadelphia & Southern Steamship Co. v. Pennsylvania*⁴ taxation of gross receipts of a domestic corporation was likewise held invalid.

What seems to be so anomalous a doctrine crept in without much observation or preliminary discussion. Probably this was the result

¹ A contrary view has been conspicuously advocated. See, in 3 Mich. Law Rev. 264 (1905), a discussion by H. L. Wilgus of the recommendation of Mr. Garfield as Commissioner of Corporations.

² *State v. C., N. O. & T. P. Ry. Co.*, 47 Ohio St. 130 (1890). See also the very forcible dissenting opinion in *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*, 118 U. S. 557 (1886).

³ *Supra*.

⁴ 122 U. S. 326 (1887).

of failure to observe the distinction between the right to engage in commerce or transportation as an individual, and such right as a corporation. These rights are essentially different in character. In *Hoxie v. N. Y., N. H. & H. R. R. Co.*¹ it was said by Baldwin, J.:

"The right to engage in commerce between the states is not a right created by or under the Constitution of the United States. It existed long before that Constitution was adopted."

But surely this language has no application to the right so to engage in commerce as a corporation. As was said above, "a state cannot be compelled to create corporations in aid of or to facilitate commerce between the states." Nor can it be compelled to continue such corporations in existence. How then can a state be compelled to allow a corporation of its creation, while in existence, to engage in commerce or transportation within the scope of the commerce clause?

The same reasoning is substantially applicable to foreign corporations. Generally speaking, a state has undoubted power to impose restrictions, even to the extent of prohibition, upon the transaction by foreign corporations of business within its limits. It is submitted that on principle such reserved power includes the imposition of restrictions upon transportation within the scope of the commerce clause. But the settled rule is otherwise.

Nevertheless the states have as to both domestic and foreign corporations general power of control over purely internal commerce, in addition to the exercise of their "police powers" for the benefit of the public. This point, which has such numerous illustrations, need not here be dwelt upon.

V. COMPARATIVE ADVANTAGES OF STATE AND FEDERAL INCORPORATION.

Of late there has been no little discussion whether there is any advantage in the creation of corporations under the authority of Congress.² As already noted, there are several instances of such creation for the purpose of engaging in commerce or transportation as carriers. So far as concerns the application of the commerce clause, the writer is not aware that such a corporation enjoys any

¹ 73 Atl. 754, 759 (Conn., 1909). See authorities cited in this well-considered opinion.

² What is here said has no reference to the power of Congress over the District of Columbia and the territories.

substantial advantage, or is, for that matter, subject to any substantial disadvantage, as compared with corporations created by the states. There has been little or no utilization of such power of Congress to create a corporation for the purpose of transporting as a shipper through the agency of carriers. The exercise of power for that purpose was recently advocated by the learned Attorney-General, who says:

“Such corporations formed under national law would not be foreign corporations in any of the states, and would therefore be at liberty to transact their business without state permission and free from state interference. . . . If, now, Congress shall enact a law providing for national incorporation to carry on interstate commerce, subject to such restrictions and with such freedom from local state control as Congress shall see fit to prescribe, the state control of foreign corporations, in all probability, will soon cease to be a subject of great importance.”¹

But if the views already stated are correct, this conclusion seems insufficiently justified. So far as concerns commerce or transportation within the scope of the commerce clause, even corporations created by the states are “at liberty to transact their business without state permission and free from state interference.” On the other hand, it remains to be established that a corporation created by Congress, at any rate one created to engage in transportation merely as a shipper, is not, to use the language of *Reagan v. Mercantile Trust Co.*, “as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates, and other police regulations.”

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¹ G. W. Wickersham in 19 Yale Law Jour. 1. See also an article by H. L. Wilgus in 2 Mich. Law Rev. 358.